

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

NETWORK OPERATOR SERVICES, INC.)

CC Docket No. 96-45

DA No. 98-1871

Petition for Waiver or, in the Alternative, for
Reconsideration)

To: Chief, Accounting Policy Division

REPLY COMMENTS OF CELPAGE, INC.

Celpage, Inc. ("Celpage"), by its attorneys and pursuant to the Commission's Public Notice of September 17, 1998, DA 98-1871 (the "Notice"), hereby submits these Reply Comments in response to the comments filed concerning the "Petition for Waiver or, in the Alternative, for Reconsideration" (the "Petition") filed by Network Operator Services, Inc. ("NOS"). NOS sought a waiver of the Commission's rules governing Universal Service contribution calculations, requesting that it be permitted to calculate its contributions based on current end-user revenues, rather than on gross end-user revenues from the proceeding year.¹

It appears from the Commission's Record Image Processing System ("RIPS") that NOS's Petition has generated very little comment, and, that comment has been uniformly negative. The only comments Celpage has been able to locate, filed by BellSouth Corporation ("BellSouth") and AT&T Corp. ("AT&T"), oppose NOS's requested waiver, arguing that NOS has not demonstrated any "unique circumstances" which would justify waiving the contribution calculation methodology codified in Part 54 of the rules. BellSouth Opposition at 1-2; AT&T

¹ Notice at 2. The Commission's rules governing contribution requirements are codified at 47 C.F.R. §§ 54.703, 54.709, 54.711.

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Comments at 2-4. These commenters further urge the Commission not to eviscerate the general rule, requiring that Universal Service contributions be based on the prior year's gross revenues, with piecemeal waivers to allow other contribution calculation methods. BellSouth Opposition at 2; AT&T Comments at 4-5. AT&T states that the harm complained of by NOS (*i.e.*, a decrease in its revenues from 1997 to 1998) is one inherent in competitive markets, and that the Commission was well aware, in adopting its Universal Service contribution requirements, that carriers might be required to pay Universal Service contributions based on higher past earnings.

AT&T Comments at 3

Although Celpage sympathizes with NOS's plight, Celpage must agree with the commenters that NOS's circumstances are hardly "unique." With the exception of monopoly local exchange carriers, few, if any, telecommunications carriers have any assurances of generating equal or increasing gross revenues each year. There are certainly no such assurances for carriers in the highly competitive CMRS industry, where customer "churn" rates are comparatively high, and where the average revenue per unit ("ARPU") has been declining over recent years. See, e.g., Third Annual CMRS Competition Report, FCC 98-91 (released June 11, 1998) at 15 (declining ARPU in wireless telephony market); 40 (paging ARPU has decreased by approximately one-third over the past five years). See also, The Strategis Group, *PAGETRAC '97: Consumer Trends in Paging*, at 107 ("Between 1992 and 1997, average service pricing for COAM local numeric paging declined 23%").

The Commission's Universal Service rules simply are not designed to account for the fluctuations in revenue experienced by companies in competitive markets; in a given year, many carriers may be required to contribute to Universal Service at a higher rate than their current

revenues can support, and be forced to raise prices to recover their Universal Service costs. It is the design of the rules themselves, rather than any unusual factual condition specific to NOS, that is causing hardship to NOS. Unless the Commission is prepared to waive its Universal Service contribution calculation method for any similarly-situated telecommunications carrier that suffers a reversal of fortunes from one year to the next, a grant of the waiver requested by NOS is inappropriate. See, e.g., Green County Mobilfone v. FCC, 765 F.2d 235, 237 (D.C. Cir. 1985) (FCC has an obligation to "treat[] similar cases similarly")

Nonetheless, Celpage believes there is merit in NOS's alternate request, and AT&T's proposal, that the Commission reconsider how Universal Service contributions are calculated. The waivers sought by NOS and others highlight the inherent unfairness in requiring competitive carriers to calculate Universal Service contributions based on the preceding year's gross revenues; the lapse in time virtually assures that some carriers will be paying contributions based on revenue figures that far exceed their current revenues. The problem is compounded by the Commission's use of carriers' gross billed revenues, with no method to account for uncollectibles. Simply put, and as observed by commenters in the Universal Service docket, the Commission's calculation method for Universal Service requires at least some carriers to pay contributions on funds that they do not actually have, and may never have had.

Although there is some precedent holding that the Commission has no authority to hold additional proceedings during the pendency of an appeal absent a remand by the reviewing court, see Greater Boston Television Corp. v. FCC, 463 F.2d 268 (D.C. Cir. 1971), Celpage has not found any case applying that principal in an open rulemaking docket where timely petitions for agency reconsideration were filed in response to the same rulemaking order under appeal. Indeed,

in the Universal Service proceeding, the Commission has issued several reconsideration orders, finding that, due to the pendency of petitions for agency reconsideration, the Commission retains jurisdiction to reconsider or revise its Universal Service rules on its own motion. See, e.g., *Changes to the Board of Directors of the National Exchange Carrier Ass'n, Inc.; Federal-State Joint Board on Universal Service, Second Order on Reconsideration*, FCC 97-400, n. 8 (released November 26, 1997), citing *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 48, n. 51 (D.C. Cir. 1978). It appears that the Commission does retain authority to undertake a limited revision of its contribution rules to alleviate economic harm to NOS and all similarly-situated carriers.

Celpage respectfully submits that, despite the pendency of multiple, consolidated appeals of the Report and Order which adopted the Universal Service rules, the recent waiver requests by NOS and others demonstrate that carriers need prompt relief from calculation rules which do not accurately reflect ability to contribute to the Universal Service Fund. Celpage believes that a "current-year" revenue approach is likely to be more equitable to carriers in competitive markets than the existing contribution calculation rules. A "current-year" methodology would prevent the need for carriers to recoup high Universal Service surcharges, based on revenues that are no longer available, from a diminished customer base. This methodology would thus not place the same upward pressure on telecommunications rates as the current rules.

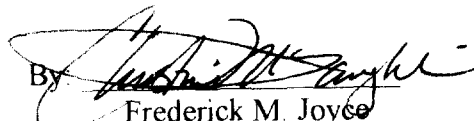
Additionally, using current revenues as a basis for Universal Service contributions furthers the principle of competitive neutrality. Using revenues from the prior year gives a new carrier an undue benefit *vis.* established carriers; for the first year of operations, that the new carrier pays nothing to the Universal Service Fund and thus has lower costs. Moreover, that inequity persists beyond the first year: no matter how significant the new carrier's subscribership and revenue

growth may be from year to year, at the expense of incumbent competitors, the new carrier continues to pay Universal Service contributions at a rate based upon its previous, lower revenues.

For all the foregoing reasons, Celpage respectfully requests that, although the waiver requested by NOS's Petition should be denied, the Commission should reconsider its Universal Service contribution calculation methodology

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rhonda M. Johnson, a secretary with the law firm of Joyce & Jacobs, Attorneys at Law, L.L.P., do hereby certify that on the 13th day of October, 1998, copies of the foregoing Reply Comments of Celpage, Inc. were sent via first class U.S. mail, postage prepaid, to the following:

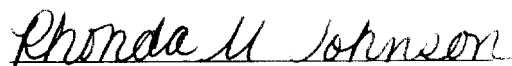
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